85-871

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALBERT T. WILLARDO, M.D.,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES AND FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED

For Appeal:

(1) Whether a State statute requiring counsel to individually sign jury instructions and which is used to deny Petitioner's right to review on certain issues where the instructions were not so individually signed is repugnant to the guarantee of the fundamental right to due process of law as established by the Fourteenth Amendment to the Constitution of the United States.

[In the event appeal is not granted as to question (1), it is prayed that the Court then grant writ of certiorari as to question (1).]

For writ of certiorari:

(2) Whether the trial Court's holding that a state statute taking effect two years following the claimed offense and reducing

the number of jurors from twelve to six in Petitioner's trial on a criminal offense of theft violates the ex post facto provisions of Article I, Section 10 of the United States Constitution.

(3) Whether a criminal indictment failing to state the alleged offense with sufficient certainty so as to leave the Petitioner to guess how, when, where and with whom in calendar year 1978 an alleged offense occurred is so vague as to violate the guarantee of Petitioner's fundamental right to due process of law as set forth in the Fourteenth Amendment to the United States Constitution.

PARTIES AFFECTED

Appellant-Defendant Below: Albert T. Willardo, M.D.

Appellee-Plaintiff Below: State of Indiana by and through its representative parties: Jack F. Crawford, Prosecutor of Lake County, Indiana and Linley E. Pearson, Attorney General for the State of Indiana.

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

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vs.

STATE OF INDIANA,

Respondent.

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES AND FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Albert T. Willardo, respectfully prays that appeal be granted to review the decision of the Supreme Court of Indiana in the above case, and/or in the alternative your Petitioner prays that a writ

of certiorari be issued to review the decision of the Supreme Court of Indiana in the above case.

OPINIONS BELOW

The memorandum decision of the Court of Appeals of Indiana under Appeal Number 4-883A269 is attached as Appendix A.

The Supreme Court of Indiana denied Petition to Transfer by memorandum order without opinion which is attached as Appendix B.

JURISDICTION

This is an appeal from judgment of conviction of a Class A misdemeanor of theft (conversion) under the laws of the State of Indiana by the Lake Superior Court, Criminal Division, Lake County, Indiana, on March 3, 1983.

An appeal was taken in a timely fashion and as provided by law to the Court of Appeals of Indiana, who affirmed the trial

Court's judgment in a memorandum decision on March 27, 1985. Petitioner filed his petition for rehearing before the Court of Appeals of Indiana, which was denied. Petitioner then timely filed his petition for transfer to the Supreme Court of Indiana, which petition was denied by an Order without opinion on September 17, 1985. No further appeal can be taken in the state court.

As to the question presented for appeal, this Court's jurisdiction is conferred by 28 U.S.C. Section 1257(2). If considered for writ of certiorari, then jurisdiction is conferred by 28 U.S.C. 1257(3).

With regard to the two questions presented for writ of certiorari, this Court's jurisdiction is conferred by 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Section 10, Clause 1

"No State shall . . . pass any . . . ex

post facto law. . . ."

Amendment XIV, Section 1

". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

STATE STATUTES INVOLVED

Indiana Code, I.C. 35-37-2-2(6)

* * *

"If the prosecuting attorney, the defendant, or his counsel desires special instructions to be given to the jury, these instructions must be:

(A) reduced to writing;

(B) numbered;

(C) signed by the party, or his attorney, who is requesting the special instructions; and

(D) delivered to the Court;

before the commencement of the argument."

Indiana Code I.C. 35-37-1-1

(a) The jury venire called by a court may be used in civil or criminal cases (b) If a defendant is charged with:

(1) murder, a Class A Felony, a Class B felony or a Class C. felony, the jury shall consist of twelve (12) qualified jurors unless the defendant and prosecuting attorney agree to a lesser number; or

(2) any other crime, the jury shall consist of six (6) qualified jurors."

STATEMENT OF THE CASE

Petitioner, Albert T. Willardo, and his family live in Highland, Indiana. He is a medical doctor licensed in the State of Indiana, who also obtained a law degree and subsequently was admitted to practice before the bar of the Supreme Court of the State of Indiana. Petitioner never actively practiced law.

In 1976, Petitioner was elected to the office of County Coroner in Lake County, Indiana, as a reform candidate.

During Petitioner's successful campaign for re-election in the spring of 1980, Willie Hearns, a former Lake County Deputy Coroner and then candidate for the office of Coroner, publicly accused Petitioner of corruptive practices as the incumbent Coroner. These accusations and an investigation by a local newspaper led to an audit of the Coroner's budget by the Indiana State Board of Accounts and the formation of a Special Grand Jury in

September, 1980, only two months prior to the general election. The Grand Jury was specifically empowered to examine the allegations of corruption within the Coroner's office, and during its two year life it met on only nine occasions (days or parts of days). Among other witnesses, it heard basically one witness testify to practices in the Coroner's office by which Petitioner had augmented his campaign fund with county disbursements for false mileage claims. This witness was Shirley Hawkins (Petitioners former office manager who was fired over one year prior to any accusations of corruptive practices). Each time the six month term of the Grand Jury was about to end, new life was breathed into it by the County Prosecutor requesting and being granted extensions. On September 3, 1982, only two days before the final extension was to run out, the Grand Jury indicted

Petitioner for theft.

Curiously, although the Grand Jury took two years and although Shirley Hawkins was called back a second time for testimony before the Grand Jury for the expressed purpose of pinpointing the dates of the alleged offenses, the indictment only generally referred to the entire calendar year of 1978 without specifying any dates or places and then merely parroted the language of the statute under which Petitioner was charged without specifying the illegal acts. The sufficiency of this indictment was challenged by a Pre-Trial Motion to Dismiss which was overruled by the trial court. It was then raised again on appeal (App. A-30) and denied by memorandum decision of the Indiana Court of Appeals (App. A-32).

Willie Hearns, the unsuccessful candidate against the Petitioner in 1980, who initiated the investigation, was never called before the Special Grand Jury and was never

produced to testify at trial.

At the outset of trial, the Court ordered, over Petitioner's objection, that Petitioner would be given a six man jury pursuant to I. C. 35-37-1-1, which became effective law in Indiana on September 1, 1982 (two days prior to the indictment) and not a twelve man jury which was in effect at the time of the alleged offense in 1978. (App. A-3). Thereafter, Petitioner asserted this as error on appeal (App. A-13) which was denied by the Indiana Court of Appeals in its memorandum decision (App. A-21).

At trial, Shirley Hawkins testified under a grant of immunity with regard to the diversion of county funds into Petitioner's campaign account. Hawkins claimed a meeting occurred between Willardo, Charles Smith (who was Willardo's former chief deputy) and herself at which time a scheme was hatched to file false mileage claims with the County

Auditor and then deposit that money in Willardo's campaign account. Smith, although repeatedly threatened and intimidated by the Prosecuting Attorney's office during the Grand Jury and even indicted for perjury, consistently denied any such meeting was had or any scheme thus hatched. Following conviction of the Petitioner, Smith's perjury charge was dismissed.

The law provided for mileage to be paid to the Coroner and others upon presenting a list of actual miles traveled. In fact, the Petitioner did sign one mileage claim form in blank at the instance of Hawkins. All of the other claims filed bore either a forged signature or a signature stamp.

According to Hawkins, this scheme was developed to get more money for Petitioner. The evidence showed however that had Petitioner filed the claims with the actual mileage traveled and had Hawkins not filed the false claims, Petitioner would have

recovered substantially more money.

Petitioner denied any wrongdoing by testifying he had no knowledge of a scheme to falsify the claims for mileage; that he believed he was entitled to travel expense but was unaware of the procedure to be followed to obtain same; that he had delegated the duty of handling the travel expense and believed they were doing it properly; and that any money in his campaign account was, in any event, used primarily for official Coroner's expenses.

At the conclusion of the evidence, the Court refused to instruct the jury on the defense of mistake of fact as tendered by Petitioner (App. A-36) and then compounded that error by instructing the jury that theft means "misappropriation" (App. A-37). This was again raised in Petitioner's Motion to Correct Errors (App. A-28) and on appeal (App. A-28), which was also denied by the

Indiana Court of Appeals (App. A-30).

On February 9, 1983, the jury found Petitioner guilty as charged. On March 3, the Court heard arguments, considered a presentence report together with petitions on behalf of Petitioner signed by 3,500 persons and entered judgment against the Petitioner on a Class A misdemeanor sentencing him to one year in prison, which sentence was suspended. The Petitioner was then placed on probation for one year with the condition that he resign from public office within 90 days and make restitution to the County in the sum of $4,299.70. Petitioner complied with these terms.

Thereafter an appeal was initiated as provided by the law of the State of Indiana and on March 27, 1985, the Indiana Court of Appeals rendered its memorandum decision affirming the judgment of the lower Court. A motion for rehearing was timely filed and denied and a Motion for Transfer to the

Supreme Court of Indiana was timely made and denied by that Court on September 17, 1985.

REASONS FOR GRANTING APPEAL

A STATE STATUTE DESIGNED TO PROVIDE FOR AN ORDERLY PROCESSING OF PAPERWORK DURING A TRIAL WAS USED BY THE INDIANA COURT OF APPEALS TO DENY PETITIONER HIS CONSTITUTIONALLY PROTECTED RIGHT TO A FAIR TRIAL AND FAIR APPEAL.

The Supreme Court of Indiana by denying petition to transfer to review the memorandum decision of the Indiana Court of Appeals in the above case held that errors of law raised on appeal and pertaining to the failure of the trial Court to give certain written instructions are waived on appeal unless it can be shown that the trial counsel signed not only the request for tendered instructions but also each and every instruction so tendered. The Court of Appeals of Indiana cited ruling precedent in the State of Indiana of Askew vs. State,

(1982), _____ Ind. App. _____, 435 N. E. 2nd 1350. The Askew decision as applied to the instant case, interpreted Indiana State Statute I.C. 35-37-2-2 to mean that if the party did not comply explicity with that statute, there could be no giving of such instructions, and further there could be no remedy on appeal. Such a ruling, would seem to fly in the face of the right of the Petitioner to a fair trial and fair appeal.

It is fundamental that every litigant, even in the civil arena, is entitled to have the jury instructed on the theory of his case (defense). In this case, petitioner's defense rested primarly on mistake of fact, an instruction on which the trial court refused. On appeal, the Indiana Court of Appeals, citing I.C. 35-37-2-2 as interpreted in Askew held that any error in such refusal was waived because petitioner and his trial counsel failed to individually sign their

tendered instructions.

It is urged that such an application of the doctrine of waiver should not be applied in a criminal case where our courts have a duty to ensure that essential instructions be given and thereby bar reversal where (as here) petitioner was convicted in the absence of such instructions.

Similarly, in Chambers v. Mississippi (1973), 410 U.S. 284, a state procedure was challenged which did not allow counsel to impeach his own witness. This court held that the challenged procedure could not bar rights under the "confrontation" clause of the Sixth Amendment made applicable to the states through the "due process" clause of the Fourteenth Amendment.

Neither should the statute here be permitted to deny petitioner a fair trial and fair appeal.

In the event direct appeal on this question is not granted, then Petitioner

seeks the granting of a writ of certiorari on this issue. The Indiana Court of Appeals failed to apply the test prescribed in South Carolina Highway Department vs. Barnwell Brothers, (1938), 310 U.S. 177 and Dean Milk Company vs. City of Madison, (1952), 340 U.S. 349.

Both South Carolina and Dean Milk Company cases challenge state or state subdivision action invoking the "commerce clause". In both instances the test applied was one of balancing the state's interest through its police powers against the constitutional rights of the individual. It is urged that the same test should be applied here. It would appear that the state's interest in the statute involved is in maintaining the orderly processing of paperwork during litigation as opposed to the Petitioner's interest in getting a fair trial and fair appeal as a matter of due process of

law as secured by the Fourteenth Amendment to the United States Constitution.

Such an encroachment of state power on individual constitutional rights should not and cannot be tolerated.

REASONS FOR GRANTING THE WRIT

THE TRIAL COURTS APPLICATION OF A NEW SIX-MAN JURY STATUTE NOT IN EFFECT AT THE TIME OF THE OFFENSE WORKED TO DEPRIVE PETITIONER OF A TWELVE-MAN JURY IN VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACT LAWS.

With regard to the Indiana State Statute providing for a six member jury which became effective just prior to Petitioner's indictment but was not effective at the time of the alleged offense, the Court of Appeals of Indiana decided a federal question in a way in conflict with decisions of another

state court of last resort. Given the facts of this case, the state courts finding ex post facto violations are McSears vs. State, (1981), ____ Ga. ____, 273 S. E. 2nd 847; and Commonwealth vs. A Juvenile, (1981), ____ Mass. ____, 425 N. E. 2nd 294. State courts holding to the contrary and often confusing ex post facto with due process are: State vs. McIntosh, (1975), ____ Ariz. ____, 532 P. 2nd 188; State vs. Maresca, (1977), ____ Conn. ____, 377 A. 2nd 1330; Iseton vs. State, (1984), ____ Ind. App. ____, 472 N. E. 2nd 642; and the unpublished opinion of the Court of Appeals of Indiana in the above case.

Additionally, it is urged that the Court of Appeals of Indiana in the instant case decided a federal question in conflict with applicable decisions of this Court, to-wit: Thompson vs. Utah, (1898), 170 U.S. 343 and Ballew vs. Georgia, (1978), 435 U.S. 223.

Thompson decided that there was an ex post facto violation in circumstances similar to those which exist here and that the number of jurors was a substantive right. Ballew reinforces the substantive right doctrine where it indicates that decreasing jury size carries with it increased risk of an erroneous verdict and that jury size is more than a question of procedure. Ballew at pp. 232-35.

For most of our country's history, this Court has held that a criminal defendant in a state court did not have a right to a jury trial. Many states, however, did grant such a right but sometimes specified less than twelve jurors.

Duncan vs. Louisiana, (1968), 391 U.S. 145, decided that the Fourteenth Amendment guaranteed a jury trial in a state court criminal case. Following the Duncan decision, the question arose as to how many members constituted a valid jury. Williams

vs. Florida, (1969), 399 U.S. 78, held that less than twelve jurors did not violate due process. Problems then developed where state statutes were enacted after the Williams decision providing for less than twelve jurors, but where at the time of the offense Defendant was entitled to twelve. In many of these instances, at the time of trial, the Defendant got a jury of less than twelve jurors. This factual situation (which is the one presented here for review) has created conflicting decisions of state courts of last resort and begs resolution by this Court.

It is here submitted that the question was answered in Thompson vs. Utah, (1898), 170 U.S. 343, where a Defendant committed a crime while Utah was still a territory thus entitling the Defendant to twelve jurors, which he got. The Defendant was convicted and the conviction was later reversed on other grounds. By the time the retrial took

place in state court, Utah had become a state and the state constitution provided for trial by jury but with less than twelve jurors. As here, the Defendant demanded twelve but was given less than twelve. On appeal to this Court, the conviction was reversed and it was held that the number of jurors was a substantive right. Thus, it continued giving Defendant a jury of less than twelve violated the prohibition against ex post facto laws under Article I, Section 10, of the Constitution of the United States.

In the instant case, the Court of Appeals of Indiana's relies upon Maxwell vs. Dow, (1900), 176 U.S. 581, for support that this court has determined that the number of jurors is a procedural right. We think their reliance is misplaced. In Maxwell, the Defendant was never entitled to twelve jurors as a matter of state law. He was in fact convicted by a jury of less than twelve and challenged that conviction arguing

that his jury had to be a jury of twelve as provided at common law. This Court held that there was no right to jury trial in a criminal case in state court, and, that due process is not offended by a jury of less than twelve.

Clearly, that is not the case here. In the instant case, as in Thompson, the Petitioner was entitled to a jury of twelve at the time of the offense, but at time of trial received a jury of less than twelve under authority of a subsequent statute. This is a clear violation of the ex post facto prohibition.

Writ of certiorari should be granted to inform state courts that Thompson is still the law and that such courts should not attempt to encroach on the authority of this Court by trying to overrule Thompson. The writ should likewise be granted to settle ex post facto cases of this kind as they have

occurred and are likely to occur many times again with the trend toward smaller juries.

II.

THE INDICTMENT RETURNED VERSUS PETITIONER WAS AS VAGUE AND UNCERTAIN AS TO DEPRIVE PETITIONER OF HIS CONSTITUTIONALLY PROTECTED RIGHT TO DUE PROCESS OF LAW.

The Court of Appeals of Indiana in the instant case also decided a federal question in a way conflicting with applicable decisions of this Court, to-wit: United States vs. Cruikshank, (1875), 92 U.S. 542; United States vs. Carll, (1881), 105 U.S. 611; United States vs. Hess, (1888), 124 U.S. 483; Russell vs. United States, (1962) 369 U.S. 749; and Hamling vs. United States, (1974), 418 U.S. 87.

The earlier cases held that a charging instrument that merely parrots the language of the statute is insufficient and that it must state facts. The more recent cases

allow the language of the statute to be used, but require that other facts be stated so that the one charged has adequate notice to enable him to defend. Such facts are not provided in the indictment in the instant case. (App. 38)

It is urged here that it should be made clear to the states that indictments must be drafted showing sufficient facts to enable those charged to present an adequate defense. The standards set forth in the cases of this Court cited above in deciding that issue through construction of the due process clause of the Fifth Amendment need to be imposed on the states through the due process clause of the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays that the Petition for Appeal be granted and/or in the alternative that his petition for writ of

certiorari be granted.

Respectfully submitted,

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IN THE

COURT OF APPEALS OF INDIANA

FOURTH DISTRICT

ALBERT T. WILLARDO, M.D., Appellant (Defendant Below)	)	
vs.	)	No. 4-883 A 269
STATE OF INDIANA, Appellee (Plaintiff Below)	)	

APPEAL FROM THE SUPERIOR COURT OF
LAKE COUNTY
The Honorable James L. Clement, Judge
Cause No. 4CR-191-982-763

MILLER, P.J.

MEMORANDUM DECISION

Dr. Albert T. Willardo, former Coroner for Lake County, was indicted for and convicted of theft in the conversion of monies isued from county funds for fraudulent mileage claims and deposited into his personal campaign fund. Upon the jury's verdict, the trial court imposed a one-year sentence for a Class A misdemeanor theft offense (IND. CODE 35-50-2-7 (Supp. 1978)), suspended the sentence and placed Willardo on probation. He further ordered Willardo to resign his post within 90 days of judgment and to make restitution to Lake County in the amount of $4,229.70. Willardo opposes his conviction on various grounds, which, condensed to their essential features, attack: the indictment, the assemblage of a six- (rather than twelve-) member jury, the trial court's refusal to give tendered instructions, error in an instruction actually delivered, the failure to sequester the jury, and the denial of a motion in

limine. We have closely examined and researched these issues but conclude none are worthy of reversal. We affirm.

ISSUES

Willardo sets forth the following propositions for our consideration as errors constituting grounds for reversal:

The trial court erred in

1. overruling Willardo's Motion to Dismiss the indictment based on the prosecutor's means of conducting the Special Grand Jury that indicted him;

2. overruling Willardo's motion for a twelve-member jury;

3. not granting Willardo's request to sequester the jury.[1]

---

1. Willardo's eight other issues presented for our consideration were waived for one reason or another. We will address them at the conclusion of our decision on the properly presented issues listed above.

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FACTS

In the spring of 1980, one Willie Hearns, a former Lake County Deputy Coroner and then-candidate for the office of Coroner, publicly accused Willardo of corruptive practices as the incumbent Lake County coroner. These accusations and an investigation by a local newspaper led to an audit of the Coroner's budget by the Indiana State Board of Accounts and the formation of a special grand jury, in September, 1980. The grand jury was specifically empowered to examine the allegations of corruption within the Coroner's office, and during its two-year life, it heard various witnesses testifying to practices in the Coroner's office by which Willardo had augmented his campaign fund with county disbursements for false mileage claims. On September 3, 1982, the grand jury indicted Willardo for theft.

At trial, Shirley Hawkins and Charles Smith (Willardo's former office manager and

chief deputy, respectively) testified under grants of immunity with regard to the diversion of county funds into Willardo's campaign account. Hawkins stated that in the spring of 1978, Willardo began to complain that his campaign account was insufficient to support his expenses and planned activities and that the measly remuneration from the Coroner's salary hardly compensated for the grossly disproportionate cost of getting elected. As a consequence, when Smith suggested that a mileage line item in the Coroner's budget was rarely exhausted, Willardo directed that some method be utilized to rechannel these funds into his campaign account. More specifically, Hawkins was instructed to falsify and file mileage claims with the County Auditor for herself, Willardo and Smith, such claims being signed by either Willardo or herself. Willardo, of course, kept the money he received personally

while Hawkins and Smith would deposit their checks into their own accounts, then would kick back that money to Willardo by checks to the campaign fund for like amounts. A portion of the campaign account was used for the legitimate purposes of the Coroner's office and its activities; other amounts, however, were diverted to political and campaign contributions.

Willardo denied any wrongdoing by testifying he had no knowledge of the scheme to falsify the claims for mileage and that his campaign account was, in any event, used primarily for official Coroner's expenses. The jury evidently believed the damning testimony of Hawkins and Smith and that of other adverse witnesses, two of whom were funeral home directors who testified Willardo had never been to their establishments for autopsies although he had received mileage reimbursements for same. They found Willardo guilty of theft.

DECISION

Special Grand Jury

Willardo filed a motion to dismiss the indictment againt him, which in its supplemented form alleged he was denied his due process rights under the Fifth and Fourteenth Amendments. On appeal, Willardo argues the indictment was faulty because of the grand jury's misconduct; specifically, he alleges it did not act duly and diligently in charging him for a 1978 offense in 1982, it did not protect its secrecy, and it became a forum for the intimidation of a State's witness. We find no error.

Our first inclination is to declare this issue waived. It is difficult for us to reconcile most of the arguments made here on appeal with those made in Willardo's motion to dismiss, and when any such differences in the motion and on appeal occur, we deem the issue waived. See Ind. Rules of Procedure,

Criminal Rule 3; Snelling v. State (1975), Ind.App., 326 N.E.2d 606. However, because it would take us nearly as long to extricate the properly preserved issues from those that have been waived as it would be to dispense with general merits of Willardo's claim, we will reach the primary issue -- whether the delay between the commission of the offense and the filing of the indictment, as caused by the two-year special grand jury investigation, was a sufficient denial of Willardo's due process rights to warrant dismissing said indictment.

Willardo's allegation of the grand jury's misconduct focus on his claims that the grand jury was convened and conducted solely to harrass him personally and was not convened for any legitimate purposes. Thus, he declares they acted too slowly, divulged numerous (but uncited) secret proceedings, and provided a platform for the prosecutor to intimidate a witness. As a consequence,

Willardo declares several prejudicial events followed, including two years of adverse publicity, the passage of time allowing a statutory change in the number of jurors from twelve to six, an absence of bank and personal records, and impairment of his memory of the events of the year in question (1978). On the assumption that the grand jury indeed conducted itself as Willardo alleges and that the aforementioned results occurred, we still must find no error because Willardo has not shown any actual prejudice to the defense of his case.

Willardo can establish a valid due process claim for the pre-indictment delay from 1978 to 1982, only if he can provide proof of actual prejudice resulting therefrom and sufficient invalid reason for the prosecutorial delay. See United States v. Lovasco (1977), 431 U.S. 783; McMorris v. State (1979), Ind.App., 392

N.E.2d 820. He has not even breached the requirements of proving the first of these factors -- actual prejudice.

Willardo has presented us with a list of events that, if true, bear with them the potential for prejudice, but "potential" prejudice is insufficient reason for quashing an indictment. It has long been the law of the land and this state that only actual prejudice will suffice for a dismissal. See, e.g., United States v. Marion (1971), 404 U.S. 307; McMorris v. State, supra; Burress v. State (1977), Ind.App., 363 N.E.2d 1036; see also Rennert v. State (1975), Ind., 329 N.E.2d 595 (actual prejudice from irregularity of grand jury proceedings must be shown); State v. Hardy (1980), Ind.App., 406 N.E.2d 313. Willardo's allegations of memory impairment, adverse publicity, and loss of records is nowhere supported in his arguments by any recital of their prejudicial effects on his case, and his contention that

the State gained a tactical advantage by filing its indictment after a jury statute became effective is countered below as being a nonprejudicial retroactive application of a trial procedure. Instead, Willardo attempts to persuade us with the mere declaration that the delay from the end of 1978 (the year of the offense) to his indictment in 1982, in conjunction with any and all "adverse" occurrences transpiring therein, was prejudicial. His efforts are fruitless.

The United States Supreme Court addressed a similar notion in the following fashion, upon a pretrial motion to dismiss an indictment:

> "The 38-month delay between the end of the scheme charged in the indictment and the date the defendants were indicted did not extend beyond the period of the applicable statute of limitations here . . . . Nor have appellees demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain

> some tactical advantage over appellees or to harrass them. Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment."

United States v. Marion, 404 U.S. at 325-26. As this opinion continues, the Court opined that events at trial may well demonstrate actual prejudice also; however, Willardo has not so demonstrated, from any aspect of the proceedings, that he was denied due process in the formulation of his defense. We find this particularly applicable inasmuch as Willardo's defense constituted a blunt denial of any wrongdoing as opposed to the defensive arguments, such as an alibi, which could wither in the passage of time. Thus, the trial court did not err when it refused to grant Willardo's motion to dismiss the

indictment. See, e.g., McMorris v. State, supra, 392 N.E.2d 820 (failure to show actual prejudice despite several events in which prejudice potentially inhered).

Six-Member Jury

Willardo was charged with an offense committed in 1978, but he was not indicted until September 3, 1982. Two days before the indictment, on September 1, IND. CODE 35-37-1-1 became effective, thereby authorizing a jury of six to try Willardo's Class D felony theft charge. At the time Willardo committed the offense, however, only a jury of twelve would have been authorized. See IND. CODE 35-1-30-1 (Supp. 1978). He now contends that the trial court's application of I.C. 35-37-1-1 (six jurors) over his motion for a twelve-member jury was an unconstitutional exercise of an ex post facto law, denying him his right to a twelve-member jury. See U.S. CONST. art. 1, Section 10; IND. CONST. art. 1 Section 24 ("No ex post

facto law shall ever be passed.") A thorough study of the subject and a recent case from this court, Iseton v. State (1984), Ind.App., 472 N.E.2d 643, reveals to us the trial court did not err.

The prohibition against the enactment of ex post facto laws is without cavil and was recently treated by this court in Finney v. State (1979), Ind.App., 385 N.E.2d 477:

> "The plain and obvious meaning of this prohibition is, that the legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignancy of a crime; or to retrench the rules of evidence, so as to make conviction more easy. Strong v. State (1822), 1 Blackford 193. The ex post facto clause [U.S. Const. art. 4, Section 10] applies only to laws which deprive a person accused or convicted of a crime of a substantial personal right which he would have had at the time he committed the offense. Thus, the inquiry turns on whether the statute changed a's substantial right' or 'mere procedure.' Warner v. State (1976), Ind., 354 N.E. 2d 178."

Id. at 480. The main thrust of this doctrine is to deny the State the power to more easily convict defendants by changing a statute and thereby rescinding a substantial right such defendants possessed at the time of the offense. But there is no prohibition upon a change in a defendant's right which smacks of procedure only. "A litigant has no vested right in a remedy or mode of procedure, and, where a law relates to matters of procedure merely, and does not deprive the accused of any substantial protection, it is not ex post facto." In re Petitions to Transfer Appeals (1931), Ind., 174 N.E. 812, 817; Watts v. State (1950), Ind., 95 N.E.2d 570. Thus, our courts have found no ex post facto prohibition when offenses occurred before the imposition of procedural laws, such as the rape shield statute (Finney v. State, supra), a statute governing moral character evidence for impeachment purposes (Robinson v. State

(1882), 84 Ind. 452), punishment changed from "stripes" to imprisonment (Strong v. State, supra, 1 Blackf. 193), alteration in State's remedy of charging offense against accessories (Sage v. State (1891), Ind., 26 N. E. 667), and transferral of criminal cases pending on appeal from the Supreme Court to the Court of Appeals (In re Petition to Transfer Appeals, supra). There was, however, error in applying a statute which removed an alternative form of punishment from a defendant. Warner v. State, supra, 354 N.E.2d 178. Our inquiry then must be to determine if the trial court's use of a six-member jury denied to Willardo a substantive right, which, to the State's advantage, made it easier to convict him.

There is no dispute that the right to a trial by jury is constitutionally guaranteed to state criminal defendants vis a vix the Sixth and Fourteenth Amendments. Duncan v. Louisiana (1968), 391 U.S. 145.

However, such right to trial by jury does not mandate a panel of twelve members but may include as few as six and still be within the constitutional requirements. Williams v. Florida (1970), 399 U.S. 78; Castro v. State (1982), Ind.App., 442 N.E.2d 1141; O'Brien v. State (1981), Ind.App., 422 N.E.2d 1266; Smith v. State (1978), Ind.App., 373 N.E.2d 1112. On the other hand, statistical data reveals a decreasing reliability of jury verdicts commensurate with a decrease in jury members such that any number less than six is a violation of the right to jury trial. Ballew v. Georgia (1978), 435 U.S. 223 (reaffirming Williams v. Florida, supra, but drawing the line at no less than six-member juries). The distilled issue here then is whether a decrease in jury size from twelve to six is a deprivation of a substantial right reflected in the decisions of twelve jurors. We think not. See Iseton

v. State, supra.

Willardo relies on Thompson v. Utah (1898), 170 U.S. 343, for the proposition that the trial court's implementation of I. C. 35-37-1-1 (six jurors) violates the ex post facto prinicple. In that case, the Supreme Court declared that the U.S. Constitution, by its mere use of the word "jury," required a panel of twelve members as at common law. Thus, the defendant, who had been originally charged and first tried under the Sixth Amendment when Utah was still a territory, was entitled to a retrial by that same number after Utah attained statehood, rather than by eight jurors as allowed by Utah's new state constitution. The Supreme Court then reversed the defendant's second conviction by eight as being within the Constitution's prohibition against ex post facto laws. At first blush, Willardo appears to be correct, but we believe his reliance upon Thompson v. Utah today is misplaced.

The underpinnings of the Thompson case, that a jury of twelve is constitutionally mandated, has been eroded by the Supreme Court's opinion in Williams v. Florida, supra, 399 U.S. 78. In that decision, the Court declared that the twelve-member requirement was not "an indispensable component of the Sixth Amendment," id. at 100, and that the historical common law jury of twelve was more an "historical accident" than a rationally conceived protection for a defendant:

> "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to

> think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12 -- particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size."

Id. at 100-01. Therefore, we are led to conclude that the right to a trial by jury is indeed a substantial right but not one that hinges upon any specific number (so long as there are no fewer than six, Ballew v. Georgia, supra, 435 U.S. 223). See State ex rel. City of Columbus v. Boyland (1979), 58 Ohio.St.2d 490, 391 N.E.2d 324; contra, Commonwealth v. A Juvenile (1981), 384 Mass. 390, 425 N.E.2d 294.

We think the Supreme Court itself clearly expressed itself on this matter in a case which has been often mischaracterized, Maxwell v. Dow (1900), 176 U.S. 581. In that case, decided two years after Thompson v. Utah, supra, 170 U.S. 343, the Utah constitutional provision allowing eight-

member juries was directly confronted in an attack by writ of habeas corpus. While upholding the practice under due process reasoning which is archaic today, the Court nonetheless referred to the propriety of the eight-member state jury as a procedural matter in the following manner:

> "[T]he state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections."

Maxwell v. Dow, 176 U.S. at 605 (emphasis added). We conclude that Willardo was not denied any substantial right when he was tried by a six- rather than a twelve-member jury but rather was subjected to a change in procedure only. In the absence of any change in a substantial right, there was no ex post facto prohibition involved. See State v. McIntosh (1975), 23 Ariz.App. 246, 532 P.2d

188; State v. Maresca (1977), 173 Conn. 450, 377 A.2d 1330; Iseton v. State, supra, contra, McSears v. State (1981), 247 Ca, 48, 273 S.E.2d 847.[2]

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2. To the extent that Castro v. State (1982), Ind.App., 442 N.E. 2d 1141, conflicts with this decision, we disagree with it. In Castro, the Third District of this court reversed a conviction upon a six-member jury verdict delivered in superior court, declaring such was harmful error. However, a closer look at the facts of that case reveals that the statutes involved allowed six-person juries in criminal cases heard in county courts. See IND. CODE 35-1-30-1 (Supp. 1979); IND. CODE 33-10.5-3-1 (1976). The defendant was only allowed six jurors although he was tried in superior court where a jury of twelve was required by statute. I.C. 35-1-30-1 ("must"). This court without exlpanation, found this to be "harmful error." The best explanation for such result we believe to be, not in any argument that the defendant was riven of any substantial right, but in the rationale of Otte v. Tessman (1981), Ind., 426 N.E.2d 660, whereby prejudice is presumed and harmful error occurs when a trial court fails to abide by mandatory procedures for conducting trials. Such reasoning, we believe, better supports the point of Castro and aligns better with the case law on the ex post facto doctrine discussed in the case at bar.

It is also pertinent to our discussion of this change in law to observe that Willardo's alleged right to a trial by twelve

Sequestering Jury

Next, Willardo argues the trial court erred in refusing to grant his motion to sequester the jury. In said motion, Willardo alleged the jury had been and would be exposed to publicity prejudicial to his

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(Continued from previous page)

jurors is not preserved by the savings clause present in the act repealing I.D. 35-1-30-1. See 1981 Ind.Acts, P.L. 298 Section 9(b). Such savings clause assures that the repealer "does not affect any rights or liabilities accrued, or any proceedings begun, before September 1, 1982. . . ." Assuming that this clause even applies to Willardo for a proceeding commenced before September 1, 1982 (the indictment was not issued until September 3), our case law clearly denies any implication that Willardo's statutory twelve-member jury is saved after repeal.

As we described above, Maxwell v. Dow (1900), 176 U.S. 581, clearly describes the specific number of jurors as a matter of procedure only. Indiana cases unmistakably stand for the proposition that criminal defendants have no vested rights in a mode of procedure, In re Petitions to Transfer Appeals (1931), Ind., 174 N.E. 812, and cannot rely on savings clauses to maintain such procedure past repeal. Greichunos v. State (1983), Ind.App., 457 N.E.2d 615. Therefore, Willardo's alleged right is not protected by any savings clause.

case. He attached thereto numerous newspaper articles, which had appeared before trial about the allegations, the Grand Jury, and various other adverse items concerning the ongoing investigation into activities in the Lake County Coroner's office. However, at no time has Willardo indicated what material was published during the trial nor how it affected the jury's impartiality and deliberations. We thus find no error.

The seperation or sequestration of a jury during trial is a choice left to the sound discretion of the trial court. IND. CODE 35-37-2-4; Brollinger v. State (1980), Ind., 408 N.E.2d 1228; Roberts v. State (1978), Ind., 373 N.E.2d 1193. In attacking such discretion, Willardo has not even made any record of actual publicity during the trial to show what the jury may have encountered, much less any showing the jury was actually so exposed so that we can determine if the trial court erred. See id.

All his argument amounts to is the contention that a generally adverse trial atmosphere existed that could not help but permeate the jury. As our supreme court has declared, this is simply not enough:

> "[W]e accept as true appellant's claim that his trial drew many spectators and received extensive press coverage from local and state media. However, these facts alone do not show an abuse of discretion by the trial court for failing to sequester the jury. Appellant has not shown that any jurors were actually exposed to the publicity or any other extraneous influences during the trial. His conclusion that the jury was improperly influenced because it was exposed to the mere possibility of contact with outside influences or to any allegedly prejudicial publicity is speculative at best."

Drollinger v. State, supra, 408 N.E.2d at 1236. Indeed, as in Drollinger, the trial court here took care to ensure the jury maintained its impartiality.

After the jury had been selected, the trial court delivered the following preliminary instruction:

"During the voir dire, each of you indicated to the Court and to the attorneys that you had not heard of the matter prior to today or that if you did, it would not make any difference in arriving at a fair verdict. You also indicated that you did not know any of the people that may be called upon during the trial. If, during the trial you should become aware that you have heard of the matter prior to today, you are to notify the Court immediately of that."

Record, p. 1102. At the end of each day, the court admonished the jury in a manner that varied only slightly from the following:

"Alright, again, we do anticipate that there will be coverage given the trial here thruout the week. Now if you are going to read your paper, you are to give it to another member of your family, have then go thru it carefully and if there is anything at all about the trial, they are to remove it from the paper before giving it to you. Do you all understand that? You are not to listen to the local radio stations here, during the evening and you understand that you are not to talk to anybody nor to allow anybody to talk with you about the matter. The alternative again, would be to keep you together thruout the week. I felt that would not be appropriate or proper. Again, we have to rely upon you to follow the admonition of the Court. It is vitally important that you not hear anything, that you not be exposed to anything about the matter, other than what you

> hear here in the courtroom. Do you all understand that? Any of you have any questions about that?"

Record, pp. 1229, 1453, 1652, 1886, 2156. A similar admonishment not to communicate with anybody about the case was given at each noon break of record. Record, pp. 1285, 1367, 1739, 1953. Each morning (except after the weekend recess) the court questioned each juror individually regarding whether they had been exposed to any trial publicity, and each responded in the negative. Record, pp. 1230, 1454, 1653, 1887. We believe the trial court adequately protected the integrity of the jury by its vigilance, and we find no abuse of discretion in its refusal to sequester. See Prollinger v. State, supra, 408 N. E. 2d 1228; Roberts v. State, supra, 373 N.E.2d 1103.

Waiver

Willardo raised eight additional issues in his brief, which, for one reason or another, were waived. Four issues were

waived for failure to cite any authority whatsoever in his appellate brief. See Ind. Rules of Procedure, Appellate Rule 8.3(A)(7); Smith v. State (1982), Ind., 432 N.E.2d 1363; Hobbs v. State (1983), Ind.App., 451 N.E.2d 356. These waived errors are whether

> --"[t]he Trial Court erred in giving its instruction number fourteen concerning alleged misappropriation of other monies for which Dr. Willardo was not charged."3
>
> --"[t]he Trial Court erred in refusing to give Dr. Willardo's instruction number four which differentiated between direct and circumstantial evidence."
>
> --"[t]the Trial Court erred in overruling Dr. Willardo's Motion in limine."

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3. Willardo did cite two statutes concerning this issue in his reply brief, but rather than ultimately determine whether such citation to authority fulfills the mandate of Ind. Rules of Procedure, Appellate Rule 8.3(A)(7), we point out two other instances of error: 1) Willardo failed to set out his verbatim objection to this instruction in his brief, see Parks v. State (1979), Ind., 389 N.E.2d 286; 2) when we searched the record for said objection, we found it was so general as to present nothing for our review. See, e.g., Green v. State (1983), Ind., 451 N.E.2d 41.

--"Dr. Willardo did not receive a fair trial within the meaning of the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution."

Appellant's Brief, pp. 2 - 3.

Three other waived issues all concern alleged error in the trial court's refusal to give Willardo's tendered instructions numbered 1, 3, and 6. Willardo erred here in failing to comply with IND. CODE 35-37-2-2(6):

> "(6) If the prosecuting attorney, the defendant, or his counsel desires special instructions to be given to the jury, these instructions must be:
>
> (A) reduced to writing;
>
> (B) numbered;
>
> (C) signed by the party, or his attorney, who is requesting the special instructions; and
>
> (D) delivered to the court;
>
> before the commencement of the argument. A charge of the court or any special instructions, when written and given by the court under this subdivision, may not be orally qualified, modified, or in any manner orally explained to the jury by the court."

In particular, neither he nor his attorney signed the questioned instructions. Thus, any error based thereon is waived, Askew v. State (1982), Ind., 439 N.E.2d 1350, and is not preserved by signing the cover sheet attached thereto. See Harding v. State (1984), Ind., 457 N.E.2d 1098.

Willardo's final issue alleges the trial court erred in overruling his motion to dismiss the indictment for failure to state the target offense with certainty. The entire argument he formulates in his brief, after setting out the indictment, is as follows:

> "While it is true that some latitude should be permitted, in regard to certainty, a child could have done a better job of drafting. No one charged in this fashion could read this and understand what he was charged with. It was obviously hurriedly drawn just before the Special Grand Jury expired, and thereafter the State could not amend the indictment as far as substance. Dr. Willardo timely filed his Motion to Dismiss on those grounds, but it was denied by the Court without comment.

(Tr. V.2, pp. 336, 340)."

Appellant's Brief, p. 21. This argument is insufficient in informing us where, why, and in what manner the indictment is deficient regarding the specificity of the charges and how Willardo was prejudiced. We will not make his argument for him so the issue is waived. A.R. 8.3 (A)(7); McManus v. State (1982), Ind., 433 N.E.2d 775. Regardless, we fail to see how any future harm can come to Willardo simply because the indictment, if deficient at all, charged him with embezzlement generally between January 1, 1978, through December 31, 1978, although specifically from Account #001-070-00213 of the Lake County Coroner's budget. Each transaction could have been stated separately, but we do not believe this failure can or will subject Willardo to double jeopardy. His conviction on this general charge shields him from additional charges arising from furthr transactions in

that account during this time period. "[W]here the offense for which the accused was previously convicted was in fact a continuing one, such as keeping a house of ill fame or operating a place where liquor was illegally sold, though the convictions were predicated upon proscribed activities on a single day, such convictions would bar subsequent prosecutions for the same type of proscribed activity at any time before the state's pleading was filed." 8 I.L.F. Criminal Law Section 98, 201-02 (1971) (footnotes omitted). There was no error.

The foregoing is the sum and substance of Willardo's appeal (no attack having been made on the sufficiency of the evidence itself), and we find no issue to support reversal. We affirm.

CONOVER and YOUNG, JJ. CONCUR.

APP. B

STATE OF INDIANA INDIANAPOLIS,46204
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

MARJORIE H. O'LAUGHLIN, CLERK
217 State House Telephone 232-1930

No. 4-883A269

Albert T. Willardo, M.D. vs. State of Indiana

You are hereby notified that the Supreme Court has on this day Appellants petition for Transfer is hereby DENIED without Opinion. All Justices Concur.

Given, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 17 day of Sept, 1985.

/s/_____
Clerk, Supreme Court and
Court of Appeals

APP. C
In The

SUPREME COURT OF INDIANA

Albert T. Willardo,
Defendant and Appellant below

vs.

State of Indiana,
Plaintiff and Appellee below

Cause No.: 4- 333 A 269 November 11, 1985

NOTICE OF PETITION FOR APPEAL

and

NOTICE OF PETITION FOR WRIT OF CERTIORARI

Comes now Andrew D. Jackson as counsel for Appellant-Petitioner Dr. Albert T. Willardo and pursuant to the Rules of the Supreme Court of the United States serves this NOTICE upon the Clerk of the Supreme Court of Indiana and the Honorable Justices thereof to inform the Clerk and Honorable Justices that he will file in the Supreme Court of the United States a Petition for Appeal from the Supreme Court of Indiana on one question of law and a Petition for Writ of Certiorari to the Supreme Court of Indiana

on several questions of law in response to a denial of Motion for Transfer rendered by the Supreme Court of Indiana on September 17, 1985 ((copy attached)).

ANDREW D. JACKSON
1526 STEIBER STREET
WHITING, INDIANA 46394
Attorney for Appellant-
Petitioner
Dr. Albert T. Willardo
(219) 659-4477

/s/

cc:
Clerk of the Supreme Court
of the United States;

Attorney General Linley Pearson

Lake County Prosecutor
Jack Crawford

Defendant's Tendered Instruction Number 1

The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the State must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

An act or a failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Court's Final Instruction Number 14

Evidence has been admitted regarding the over-the-counter sale of certain documents in the Coroner's Office, where the proceeds went into the account of the Committee to Elect Dr. Willardo. This evidence has been admitted solely as it may relate to the defendant's knowledge or lack of knowledge of the alleged misappropriation of money from the Travel Expense Account as charged in the Indictment and for no other purpose.

The Defendant is not on trial for the alleged misappropriation of document fees. He is on trial for the alleged misappropriation of money from the Travel Expense Account in 1978 and your verdict must be either guilty or not guilty of that charge only.

APP. F

INDICTMENT

The Grand Jurors of Lake County, in the State of Indiana, good and lawful men, duly and legally impaneled, charged and sworn to inquire into felonies and certain misdemeanors in and for the body of said County of Lake, in the name and by the authority of the State of Indiana, on their oaths present that one ALBERT T. WILLARDO, M.D. of said County, on the January 1, 1978 through December 31, 1978, inclusive, at said County and State aforesaid, did then and there did knowingly or intentionally exert unauthorized control in a manner or to an extent other than that to which the other person has consented over property of Lake County, Indiana, a body politic or corporate, to-wit: money from the Lake County, Indiana, Coroner's Budget (Calendar year 1978) Account Number 001-070-00213 (Traveling Expenses), with the intent to deprive the said Lake County, Indiana, a body politic or corporate, of the value and use thereof. . .